Ismail Zakaria v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–11 OF 2008
SURAYA OTHMAN J
25 MAY 2009

Civil Procedure — Judge — Application to recuse judge — Real danger of bias test — Judge acting as treasury solicitor and presiding judge — Whether would give rise to real danger of bias not to act fairly or impartially in applicant's criminal trial

On 30 April 1999, the accused/applicant ('the applicant'), a chief executive officer of a bank was charged with four principal charges under the Banking and Financial Institutions Act 1989 and four alternative charges for criminal breach of trust under s 409 of the Penal Code. On 2 December 2004 (after the prosecution closed its case), both parties filed their respective submissions in court. On 1 June 2007, Puan Khadijah Idris, the presiding sessions court judge ('the judge') in the case until this time, was appointed as treasury solicitor in the Ministry of Finance. On 2 August 2007 when the judge called the applicant to enter his defence, the defence applied for a written judgment and thereafter dates were fixed for the continued hearing of the defence case. On 28 January 2008 at the date of the continued hearing, the applicant applied to the judge to recuse herself from the case on the basis that she was the treasury solicitor and therefore an officer subordinate to the attorney general, who sanctioned his prosecution. The judge then instructed the applicant to file a written application for recusal. At this hearing, the applicant submitted that the judge was unsuitable to continue presiding over his case because she was in a position of conflict as the duties of a judge presiding in a criminal case and those of a treasury solicitor, who is required to provide legal advisory services to the Ministry of Finance and the Central Bank of Malaysia, were different and totally irreconcilable. As such, the applicant contended that if the judge continued to hear the case, there was a danger of bias and therefore he may not receive a fair and impartial trial. When the judge dismissed the application for recusal, the applicant filed this notice of motion supported by an affidavit. The matter was therefore taken on revision before the High Court to determine whether the judge's dual role as treasury solicitor and presiding judge will give rise to a real danger of bias on her part not to act fairly or impartially in the applicant's criminal trial.

Held, dismissing the notice of motion:

(1) The real test to be applied in dealing with the issue of judicial bias is the real danger of bias test which was laid down by the apex court in the case of *Mohd Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293. Upon considering the facts of the present case, it was found that the applicant had failed to prove that there was any real danger of bias on the part of the judge if she continued to hear the applicant's trial to the end. In her role as treasury solicitor, the judge handles only policy matters at the Ministry level and as such, was not involved in the evaluation of evidence for the purpose of prosecution. As such, it was too remote to conclude that the judge was in a position of bias by virtue of her being a Treasury Solicitor (see paras 49, 54–55).

(2) Further, the decision of the Federal Court in *Mukhtar bin Abdul Rahman v Public Prosecutor* [2009] 2 MLJ 139 had clearly given direction to all courts below that when dealing with the issue of judicial bias involving an officer from the judicial and legal service, the paramount consideration for the court to consider is whether there is any real danger of bias. Thus, in the present case, the holding of a dual role, ie as an officer in the attorney general's chambers and as a sessions court judge did not automatically disqualify the judge or put her in a position of conflict from continuing to hear a case which was begun when she was a judicial officer. Therefore in the circumstances, this court should not exercise its revisionary powers in this case as there were no cogent reasons for it to do so. In fact, the judge was the best person to continue hearing the case after having heard it from the beginning (see paras 47, 56–57 & 60).

(3) It was also premature at this juncture to make a finding or conclusion that the judge had already rejected the applicant's defence as the applicant had yet to commence to make his defence. The judge still had the duty to re-evaluate the case in totality after the defence had presented its case. As such, the allegation that she had rejected the applicant's defence before even hearing it was premature and misconceived (see para 59).

[Bahasa Malaysia summary

Pada 30 April 1999, tertuduh/pemohon ('pemohon'), seorang ketua pegawai eksekutif sebuah bank dituduh dengan empat tuduhan utama di bawah Akta Perbankan dan Institusi Kewangan 1989 dan empat tuduhan alternatif untuk jenayah pecah amanah di bawah s 409 Kanun Keseksaan. Pada 2 Disember 2004 selepas pihak pendakwa raya menutup kesnya, kedua-dua pihak memfailkan hujahan mereka di mahkamah. Pada 1 Jun 2007, Puan Khadijah

Idris, hakim mahkamah sesyen ('hakim') dalam kes sehingga waktu ini, telah dilantik sebagai peguam cara perbendaharaan di Kementerian Kewangan. Pada 2 Ogos 2007, apabila hakim memanggil pemohon untuk memasukkan pembelaannya, pihak pembelaan memohon untuk penghakiman bertulis dan kemudiannya tarikh-tarikh ditetapkan untuk sambung bicara kes pembelaan. Pada 28 Januari 2008 pada tarikh sambung bicara pemohon memohon kepada hakim untuk menyingkirkan diri beliau daripada kes tersebut atas dasar bahawa beliau merupakan peguam cara perbendaharaan Cara dan oleh itu seorang pegawai bawahan kepada peguam negara, yang memberikan sanksi untuk pendakwaannya. Hakim mengarahkan pemohon untuk memfailkan permohonan bertulis untuk penyingkiran tersebut. Pada perbicaraan ini pemohon menghujah bahawa hakim tersebut tidak sesuai untuk menyambung perbicaraan kesnya kerana beliau berada dalam kedudukan konflik memandangkan tugas-tugas beliau sebagai hakim yang bersidang dalam kes jenayah dan sebagai peguam cara perbendaharaan, yang diperlukan untuk memberikan perkhidmatan penasihat undang-undang kepada Kementerian Kewangan dan Bank Negara Malaysia, adalah berlainan dan bertentangan sama sekali. Oleh itu, pemohon menegaskan bahawa sekiranya hakim tersebut menyambung perbicaraan kes tersebut maka terdapat bahaya berat sebelah dan oleh itu dia mungkin tidak akan dibicarakan secara adil dan saksama. Apabila hakim menolak permohonan penyingkiran, pemohon memfailkan notis usul disokong dengan afidavit. Oleh itu perkara ini disemak di Mahkamah Tinggi untuk menentukan sama ada dua tugas hakim sebagai peguam cara perbendaharaan dan hakim yang bersidang akan menimbulkan bahaya berat sebelah pada pihak beliau untuk tidak bertindak secara adil dan saksama dalam perbicaraan jenayah pemohon.

Diputuskan, menolak notis usul:

(1) Ujian yang perlu digunakan apabila berurusan dengan isu berat sebelah kehakiman ialah ujian kebahayaan berat sebelah yang dikemukakan oleh mahkamah tertinggi dalam kes *Mohd Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 dan *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293. Selepas mempertimbangkan fakta-fakta dalam kes ini diputuskan bahawa pemohon gagal untuk membuktikan bahawa terdapat bahaya berat sebelah di pihak hakim tersebut sekiranya beliau menyambung perbicaraan pemohon sehingga selesai. Dalam menjalankan tugasnya sebagai peguam cara perbendaharaan hakim tersebut hanya mengendalikan perkara-perkara berkaitan polisi di peringkat Kementerian dan oleh itu tidak terlibat dalam penilaian keterangan bagi tujuan pendakwaan. Oleh itu, adalah terlalu jauh untuk memutuskan bahawa hakim tersebut berada dalam kedudukan berat sebelah disebabkan oleh kedudukannya sebagai peguam cara perbendaharaan (lihat perenggan 49, 54–55).

(2) Selanjutnya, keputusan Mahkamah Persekutuan dalam kes *Mukhtar bin Abdul Rahman v Public Prosecutor* [2009] 2 MLJ 139 secara jelasnya memberi panduan kepada semua mahkamah rendah bahawa apabila berurusan dengan isu berat sebelah kehakiman yang melibatkan seorang pegawai daripada perkhidmatan kehakiman dan perundangan, mahkamah perlu mempertimbangkan sama ada terdapat berat sebelah yang sebenarnya. Oleh itu, dalam kes ini pemegangan dua tugas iaitu, sebagai seorang pegawai di jabatan peguam negara dan sebagai hakim mahkamah sesyen bukan secara automatik boleh menyingkirkan hakim tersebut atau meletakkan dirinya dalam kedudukan konflik daripada menyambung perbicaraan kes yang bermula apabila beliau adalah pegawai kehakiman. Oleh itu dalam keadaan ini, mahkamah tidak boleh menggunakan kuasa semakan dalam kes ini memandangkan tiada sebab-sebab yang jelas untuk berbuat demikian. Malah hakim tersebut adalah orang terbaik untuk menyambung perbicaraan selepas mendengarnya daripada awal (lihat perenggan 47, 56–57, 60).

(3) Adalah pra-matang pada peringkat ini untuk membuat dapatan atau kesimpulan bahawa hakim telahpun menolak pembelaan pemohon memandangkan pemohon belum lagi memulakan pembelaannya. Hakim masih mempunyai kewajipan untuk menilai semula kes tersebut secara keseluruhan selepas pihak pembelaan mengemukakan kes mereka. Oleh itu, dakwaan bahawa beliau telah menolak pembelaan pemohon sebelum perbicaraan adalah pra-matang dan merupakan salah tanggapan (lihat perenggan 59).]

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3748–3752.

Cases referred to

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (folld)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (not folld)

Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 1 All ER 65, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Maleb bin Su v Public Prosecutor [1984] 1 MLJ 311, HC (folld)

Metropolitan Properties Co (FGC) Ltd v Lannon & Ors [1969] 1 QB 577, CA (folld)

Mohd Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (folld)

Mukhtar bin Abdul Rahman v PP [2009] 2 MLJ 139, HC (folld)

Pinochet Ugarte (No 2), Ex parte [1999] 1 All ER 577, HL (refd)

PP v Kulasingam [1974] 2 MLJ 26, HC (folld)
R v Barnsley Licencing Justices, Ex parte Barnsley and District Licensed Victuallers' Association & Anor [1960] 2 QB 167, CA (refd)
R v Gough [1993] AC 646, HL (folld)

Legislation referred to

Banking and Financial Institutions Act 1989 s 65(1)
Courts of Judicature Act 1964 ss 31, 35
Criminal Procedure Code ss 261, 323, 325
Penal Code s 409

V Sithambaram (K Kumaraendran with him) (Sitham & Associates) for the accused.
Azmi bin Ariffin (Ahmad Fairuz Zainal Abidin with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the prosecution.

Suraya Othman J:

[1] This notice of motion was filed by the applicant/accused in the original case for the following orders:

(i) that the order of the presiding sessions court judge, Puan Khadijah Idris made on 6 February 2008 dismissing the applicant/accused's application that she recuse herself from continuing to hear and determine Arrest Case Nos 62–54 of 1999, 62–55 of 1999, 62–56 of 1999 and 62–57 of 1999 be hereby set aside;

(ii) that Puan Khadijah Idris, presiding as sessions court judge in all the above mentioned cases do forthwith recuse herself from continuing to hear and determine all further proceedings in the said cases;

(iii) that the order calling for the defence of the applicant/accused by Puan Khadijah Idris in all the above cases be hereby set aside and the case continue before the present sessions court judge under s 261 of the Criminal Procedure Code;

(iv) alternatively that the hearing and determination of all further proceedings in the above cases continue before the present sessions court judge pursuant to s 261 of the Criminal Procedure Code; and

(v) further and other reliefs or orders as this honourable court deems fit and proper.

GROUNDS OF APPLICATION

[2] The reasons or grounds of this application as stated in the said notice of motion are as follows:

(a) that Puan Khadijah Idris at the time when she delivered this honourable

court's decision calling for the applicant/accused to enter his defence on all the four principal charges under the Banking and Financial Institutions Act 1989, is the treasury solicitor;

(b) that as treasury solicitor, Puan Khadijah Idris is required to provide legal advisory services to the Ministry of Finance and advising the said Ministry on the interpretation of laws under the ministry's jurisdiction which include laws pertaining to the Central Bank of Malaysia ie the Banking and Financial Institutions Act 1989;

(c) that Puan Khadijah Idris's dual role as treasury solicitor and sessions court judge are incompatible and will cause embarrassment; and

(d) that the recusal of Puan Khadijah Idris from continuing to hear and determine this case, would ensure the complete impartiality of the proceedings before the court without any danger of bias and preserve the integrity and sanctity of the proceedings against the applicant/accused.

[3] This application is supported by an affidavit filed by the applicant.

FACTS OF THE CASE

[4] The brief facts which led to this application before me are as follows:

[5] The applicant, a chief executive officer of a bank faced four charges under s 65(1) of the Banking and Financial Institutions Act 1989 (BAFIA) for acting outside the scope of the terms and conditions imposed on him by the licensed institution by giving credit facilities to Everise Capital Sdn Bhd for the purchase of shares contrary to the purpose for which the credit facility was approved by the board of directors of Sime Bank Bhd. The board had approved the loan towards repayment of loses incurred by a related company. He also faced four alternative charges for criminal breach of trust under s 409 of the Penal Code (FMS Cap 45).

[6] The applicant/accused was first charged at the Sessions Court of Kuala Lumpur on 30 April 1999 and the first date of hearing was on 15 February 2000 before the learned sessions court judge, Puan Khadijah Idris.

[7] The trial continued before the said judge until the 14 September 2001 when she was transferred to the Economic Planning Unit (EPU) at the Prime Minister's department as a legal advisor.

[8] Based on the application made by the accused's counsel, the Chief Judge of Malaya on the 17 April 2003 allowed the said judge to continue hearing the case.

[9] On 2 December 2004, the prosecution closed its case. While both parties filed their respective submissions in court, Puan Khadijah Idris was then appointed as Treasury Solicitor in the Ministry of Finance on 1 June 2007. A

[10] On 2 August 2007, the accused was called to enter his defence. The defence applied for a written judgment and the judge agreed to the request. Dates were then fixed for the continued hearing of the defence case. B

[11] On the date of continued hearing on 28 January 2008, the defence objected to Puan Khadijah Idris continuing hearing the case on the basis that she is the treasury solicitor and as such she should recuse herself from further hearing the case. The said judge then instructed the defence to file in a written application for recusal. C

[12] On 6 February 2008, Puan Khadijah Idris dismissed the application for recusal. Based on that dismissal, the defence then filed this notice of motion before this honourable court. D

[13] The applicant/accused's objection to Puan Khatijah Idris continuing presiding over his case was due to his fear that he may not get a fair and impartial hearing when the defence case is heard by the said judge. It's the applicant/accused's belief that Puan Khadijah Idris, being an officer of the attorney general's chambers serving under the right honourable attorney general, who sanctioned the prosecution, is in a position of conflict as the duties of a judge presiding in a criminal case and that of an officer subordinate to the attorney general, who in his capacity is also the public prosecutor, are different and totally irreconcilable. E F

[14] It was also contended by the applicant/accused that Puan Khadijah Idris being the treasury solicitor is required to provide legal advisory services to the Ministry of Finance and give advise to the Minister and Central Bank of Malaysia on the interpretation of the laws under the Finance Ministry and Central Bank. This fact makes her unsuitable to continue presiding as a judge in this case. G H

[15] The applicant/accused further contended that Puan Khadijah Idris's role as treasury solicitor, being the legal advisor from the attorney general's chambers to the Ministry of Finance on Central Banking laws including BAFIA and her required independent role as a sessions court judge are incompatible. Hence, the learned judge should not continue or remain as the arbiter in this criminal case as this may prejudice his fair and impartial trial. I

[16] Lastly, the applicant/accused wish to leave this court with the feeling that he has received a fair and impartial trial. The present position of the learned judge makes it highly undesirable that she continues to hear his case as there is a danger of bias.

ISSUE TO BE DECIDED

[17] Therefore, the main issue for this honourable court to decide is whether Puan Khadijah Idris's dual role as treasury solicitor and sessions court judge will give rise to a real danger of bias on her part not to act fairly or impartially in the trial of the applicant/accused. If the answer is in the affirmative, then she cannot continue hearing the case but must recuse herself. If the answer is in the negative, then she will have to continue hearing the case till the end of the trial and give her decision.

REVISIONARY POWERS OF THE HIGH COURT

[18] Sections 31 and 35 of the Courts of Judicature Act 1964 (Act 91) ('CJA 1964') bestow on the High Court the powers of revision and supervision in respect of criminal proceedings and matters in subordinate courts. Sections 31 and 35 state:

Revision of criminal proceedings of subordinate courts

31 The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

General supervisory and revisionary jurisdiction of High Court

35(1)In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its won motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[19] This revisionary and supervisory powers of this High Court is further explained in the Criminal Procedure Code (FMS Cap 6) ('CPC') in ss 323 and 325 of the Code. Sections 323 and 325 state:

323 Powers to call for records of subordinate Courts.

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

325 Powers of Judge on revision.

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[20] It is clear from the above provisions that the purpose of revision is for a judge to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings in the subordinate court.

[21] This power is clearly explained in the case of *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 which states that:

> The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-s (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[22] So based on the above legal preposition, it is the duty of this court to examine whether by dismissing the application of learned defence counsel for her to recuse herself from continuing presiding over the case, Puan Khadijah Idris has done something which comes within the ambit of the revisionary powers of this court ie her ruling is incorrect, illegal, improper or irregular as according to the laws applicable.

A **[23]** If the answer to the above question is in the affirmative, then this revision would be allowed and the trial at the subordinate court will have to be continued by another sessions judge under s 261 of the CPC. If not, Puan Khatijah Idris would then have to continue presiding over this case until the end of the trial.

B

THE LAW REGARDING ISSUE OF BIAS

[24] I shall begin with the legal definition of judicial bias as defined by *Black's Law Dictionary* (7th Ed) by Bryan A Garner. According to Black,
C judicial bias means:

> Bias that a judge developes during a trial. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial
D reason.

[25] The word bias is also defined by the *Oxford Companion to Law* which states that:

E > Bias is an inclination to decide an issue influenced by any consideration other than its merits.

[26] We shall now move to the legal aspect of the issue of bias. What is the
F test that this court should apply before recusal is allowed.

[27] It is crystal clear from the decision of the Federal Court through the case of *Mohd Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, that the test for recusal is a 'real danger of bias' test.

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[28] The learned Federal Court judges in this case discussed various English and Malaysian cases with regard to the issue of bias.

[29] Mohammad Dzaiddin CJ (as he then was) at p 324 held that:

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> In England, the courts applied the 'real danger of bias test' in a criminal case. In *R v Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in details, reformulated the real danger test as follows.

I

> > Having ascertained the relevant circumstances, *the court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration.*

His Lordship also made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals or with jurors or with arbitrators.

[30] In *Ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577, the House of Lords considered *R v Gough*. In the course of his judgment, the presiding judge, Lord Browne Wilkinson, referred to the conflict of judicial opinion as to correct test to apply when apparent bias is alleged and left open the question whether the test in *R v Gough* needs to be reviewed.

[31] In *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65, the English Court of Appeal applied the *R v Goughs* test and stated that the court must ask itself whether '... in the circumstances of the case ... it appears that there was a real likelihood, in the sense of a real possibility of bias ...' It is further held that in answering this question the court must take into account the actual facts as disclosed by the evidence and in particular, what it was the judge knew at the time the case was being heard.

[32] In Malaysia, the court in *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, followed the 'real danger of bias' test as expounded in *Gough* as this, according to the judge, will avoid setting aside of judgment upon quite insubstantial grounds and the flimsiest pretexts of bias.

[33] The judgment of Lord Denning in the case of *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1969] 1 QB 577 illustrates a different concept of judicial bias and the test that should be applied. His Lordship stated:

A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a 'direct pecuniary interest' in the subject matter. Second, 'bias' in favour of one side or against the other.

So far as 'pecuniary interest' is concerned, I agree with the Divisional Court that there is no evidence that Mr John Lannon had any direct pecuniary interest in the suit.

So far as bias is concerned, it was acknowledge that there was no actual bias on the part of Mr Lannon and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear: but I start with the oft-repeated saying of the Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 'it is not 12 merely of some importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

In *R v Barnsley Licencing Justices, Ex parte Barnsley and District Licensed Victuallers' Association & Anor* [1960] 2 QB 167, Devlin J appears to have limited that principle considerably, but I would stand by it. It brings home this point: in

> considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever he may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. *The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.* And if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case maybe, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the judge was bias'.

[34] The above English position was adopted by our Malaysian court. The Court of Appeal in the case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, had this to observe:

> To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

[35] It is therefore clear from these two cases, (*Metropolitan Properties Co* and *Hock Hua Bank*), that to decide on whether there is bias, 'surmise or conjecture' is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the judge would, or did, favour one side unfairly at the expense of the other. *It is not on the judge, or even the applicant point of view but from the reasonable and fair-minded on looker*.

[36] The question then to be asked is what is the test to be applied regarding biasness. There seem to be two conflicting decisions on the test to be used; one based on the real danger of bias test and the other on a reasonable and fair minded on looker test. By virtue of the doctrine of 'stare decisis', this court will have to abide by the higher courts decision. This is important to ensure the uniformity of the living laws and principles applicable in our country.

[37] In the case of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, the Federal Court while dismissing the appeal held that:

The Court of Appeal is bound by the doctrine of stare decisis to follow the real danger of bias test for recusal adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang* and *Mohamed Ezam*. It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. Until such time that the *Federal Court holds otherwise, the test of 'real danger of bias' for recusal will remain entrenched and binding on all inferior courts* including the Court of Appeal.

CONFLICTING POSITION OF THE TRIAL JUDGE

[38] It is the basis of this application that Puan Khadijah Idris being an officer of the attorney general's chambers serving under the attorney general who sanctioned the prosecution of the accused is in a position of conflict because the duties of a judge presiding over in a criminal case and that of an officer subordinate to the attorney general are different.

[39] The issue becomes more crucial when at the time she delivered her decision at the end of the prosecution's case, calling for the applicant's to enter his defence, she is the treasury solicitor ie legal adviser to the Ministry of Finance. The applicant was charged under BAFIA which comes under the purview of the Ministry of Finance.

[40] A similar issue was brought before the Federal Court in *Mukhtar Abdul Rahman v Public Prosecutor*, Federal Court Criminal Appeal No 07–1 of 2008.

[41] The brief facts of this case are as follows:

[42] The defence had applied to the magistrate to recuse herself because she was a deputy public prosecutor in the Anti-Corruption Agency when she heard the defence case. Hence, the defence contended that it was not appropriate for her to continue presiding over the case. The magistrate refused to recuse herself. The matter was taken on revision to the Alor Star High Court. The High Court agreed that there was no necessity for the magistrate to recuse herself and that she can continue to hear the case despite the fact that she is now a deputy public prosecutor in the state of Penang. The defence then appealed to the Court of Appeal who dismissed the appeal. The case then went to the Federal Court for final decision.

[43] The Federal Court headed by the Chief Justice, Abdul Hamid Mohamad held that the transfer of officers between the two services is part of the continuous legal education that the officers in the judicial and legal

A service are exposed to and found no merits in the application. The appeal was subsequently dismissed and the decisions of the High Court and Court of Appeal were affirmed.

B **[44]** After carefully examining the facts that arose in *Mukhtar*'s case, I cannot but agree with the submission of the respondent that the constellation of factors in that case are more compelling for the applicant to succeed and for the trial magistrate to recuse herself.

C **[45]** The facts are:

(i) the presiding magistrate is currently an officer of the attorney general's chambers;

(ii) the presiding magistrate is currently a deputy public prosecutor in the
D state of Penang;

(iii) the presiding magistrate was a deputy public prosecutor in the Anti-Corruption Agency when she heard the defence case; and

(iv) the charge faced by the applicant is corruption in nature.

E

[46] Despite all the above facts, the Federal Court affirmed the decision of all the courts below by rejecting the application for recusal.

F **[47]** Therefore *Mukhtar*'s case concluded that holding a dual role or position; one as an officer in the attorney general's chambers and the other as a magistrate (or in this case a sessions court judge), does not automatically disqualify or put a person in a position of conflict from continuing hearing or presiding over a case which was begun when he or she was a judicial officer.

G

[48] It would seem that what is more important here is whether there is any real danger of bias on the part of the presiding officer if he or she is to continue hearing the case. This is the paramount consideration for the court to consider.

H

FINDING OF THIS COURT

[49] It's the decision of this court that the correct test to be applied in dealing with the issue of judicial bias is the real danger of bias test which was
I laid down by the apex court in the case of *Mohd Ezam* and *Dato' Tan Heng Chew*.

[50] The other tests which the defence relied on, which was earlier applied in the case of *Hock Hua Bank* ie a reasonable and fair minded onlooker which

is akin to the 'reasonable suspicion' test or a real likelihood or real possibility of bias test are not the correct tests to be applied.

[51] The 'reasonable suspicion' test was rejected by the House of Lords in *R v Gough* which was subsequently followed in the Malaysian case of *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* as well as the Federal Court cases of *Mohd Ezam v Ketua Polis Negara* and *Dato' Tan Heng Chew v Tan Kim Hor*. In the said cases, the court applied the 'real danger of bias' test, as explained by Lord Goff in *R v Gough*:

> Furthermore, I think *it is unnecessary*, in formulating the appropriate test, *to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge which would not necessarily be available to an observer* in court at the relevant time. (Emphasis added.)

[52] Lord Goff, in *R v Gough*, also said that the court should ask itself whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question. *Therefore, it is not the mind of a reasonable and fair-minded onlooker or the applicant that will decide whether there is a real danger of bias but the court*. This is so since the court personifies the reasonable man and the court has first to ascertain the relevant circumstances from the available evidence which knowledge is not available to an observer in court ('a reasonable and fair-minded onlooker').

[53] Furthermore, in *Locabail Ltd v Bayfield Properties*, the English Court of Appeal applied the *R v Gough* test that '... the court must take into account the actual facts as disclosed by the evidence and, in particular, *what it was that the judge knew* at the time the case was being heard' (emphasis added) in considering the question of biasness on the part of the trial judge.

[54] Therefore having considered the facts and authorities submitted by counsel for the applicant, my finding is that the applicant fails to prove that there is any real danger of bias on the part of the learned judge if she is to continue to hear this trial to the end. Clearly the applicant has even failed to demonstrate the existence of a real likelihood of biasness (even though the test is a real danger of biasness test).

[55] The fact as it stands is that the position of Puan Khadijah Idris as treasury solicitor does not in any way put her in a position of bias since the duties of a treasury solicitor is totally different from that of a prosecuting

officer. A treasury solicitor handles only policy matters at the ministry level. Although she may from time to time advise on the interpretation of laws, including BAFIA, she is still not involved in the evaluation of evidence for the purpose of prosecution. Such duties lie with the prosecution department of Bank Negara which in turn gets direction directly from the officers in the prosecution department from the attorney general's chambers. As such, it is too remote to conclude that Puan Khadijah Idris is in a position of bias by virtue of her being a treasury solicitor. As laid down in *R v Gough*, the House of Lord rejected the reasonable suspicion test and reformulated the real danger test as explained above in this judgment.

[56] Furthermore the decision of the Federal Court in *Mukhtar Abdul Rahman* has clearly given direction to all the courts below in dealing with the issue of judicial bias involving judicial and legal service officer. The wisdom in this decision must surely be due to the strict test of alleging such bias to exist.

[57] Therefore in the circumstances, this court should not exercise its revisionary powers in this case as there are no cogent reasons for it to do so. This application cannot operate as an appeal. As stated in *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311, the refusal or dismissal of an application to disqualify a judge is not appealable since it does not finally dispose of the rights of the accused person. Therefore, it cannot be circumvented by applying to the court for a revision of the order made.

[58] As to the application by the applicant for this court to set aside the order of the learned trial judge for the accused to enter his defence, I found it without merits whatsoever. This is so since this court is not seized of the facts and evidence of this case and to reverse the order of the trial judge may tantamount to an abuse of process of this court.

[59] It is also premature at this juncture to make a finding or conclusion that the learned trial judge has already rejected the accused defence as the accused has yet to commence to make his defence. Puan Khadijah Idris can still reevaluate the case in totality after the defence has presented its case. This is her duty to do so. Therefore the allegation that she had rejected the defence of the applicant/accused before even hearing it is premature and misconceived.

[60] As such, based on all the above findings, the trial judge, Puan Khadijah Idris is the best person to continue to hear this case. She has heard this case from the beginning. She has seen and heard all the prosecution's witnesses and she should be allowed to resume to hear the accused's defence and make a decision at the conclusion of that defence. As averred to earlier,

her position as treasury solicitor would not cause a real danger of bias on her part as her duties as a treasury solicitor and her duties as a sessions court judge are different and does not put her in a position of conflict.

[61] In the circumstances, the notice of motion is duely dismissed. The order made by Puan Khadijah Idris not to recuse herself is correct. There is no real danger of bias on her part. This case is therefore reverted back to the sessions court for Puan Khadijah Idris to resume the case until its conclusion.

[62] Notice of motion dismissed.

Notice of motion dismissed.

Reported by Kohila Nesan